Supreme Court, U.S.
FILED

94 1549 MAR 20 1995

OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

UNITED STATES of America ex rel.
Patrick GLEASON, PETITIONER,

v.

George WELBORN,
Warden of the Menard
Correctional Center,

and ATTORNEY GENERAL OF THE
STATE OF ILLINOIS,
RESPONDENT.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

LEONARD C. GOODMAN
Counsel of Record
53 West Jackson Blvd.
Suite 1460
Chicago, IL 60604
(312) 986-1984

QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to compulsory process and due process where a reluctant defense witness was granted a blanket Fifth Amendment privilege although the record reveals no conceivable basis for that witness' purported fear of incrimination and where the prosecutor coerced that witness into silence by threatening an unwarranted prosecution.

2. Whether Petitioner was denied his due process right to a fair and impartial trial where the record clearly demonstrates that the trial judge was hostile to him.

3. Whether Petitioner's thirty-year sentence is the result of a constitutionally defective sentencing process where the Illinois Appellate Court reduced Gleason's to the maximum legal sentence to accommodate the trial judge's personal desire to see Petitioner severely punished.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PRAYER 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION:

I.

PETITIONER WAS DENIED HIS RIGHT TO COMPULSORY PROCESS WHERE THE TRIAL JUDGE REFUSED TO COMPEL THE TESTIMONY OF A CRITICAL WITNESS ALTHOUGH THE RECORD REVEALS NO CONCEIVABLE BASIS FOR THE WITNESS' CLAIMED FEAR OF INCRIMINATION; THIS CASE DEMONSTRATES THE NEED FOR THIS COURT TO DEFINE MINIMAL CONSTITUTIONAL SAFEGUARDS TO PROTECT THE COMPULSORY PROCESS RIGHTS OF THE ACCUSED AS WELL AS THE FIFTH AMENDMENT CONCERNS OF A RELUCTANT WITNESS..... 9

II.

PETITIONER WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL TRIAL BECAUSE THE TRIER OF FACT WAS BIASED AGAINST HIM..... 20

III.

GLEASON'S THIRTY YEAR SENTENCE IS THE RESULT OF A FLAWED SENTENCING PROCESS..... 25

CONCLUSION 28

APPENDICES

A Opinion and Judgment Order of the United States Court of Appeals for the Seventh Circuit, dated December 19, 1994..... A-1

B Judgment Order of the United States District Court for the Northern District of Illinois, Eastern Division, dated March 10, 1994.. B-1

C Opinion of the Illinois Appellate Court dated December 28, 1992... C-1

TABLE OF AUTHORITIES

CASES

Gayle v. Scully, 779 F.2d 802 (2nd Cir. 1985), cert. denied, 479 U.S. 838 (1986) 24

Gleason v. Welborn, 42 F.3d 1107 (7th Cir. 1994) 1, 8, 15, 18, 26

Hoffman v. United States, 341 U.S. 479 (1950) 12, 13, 15

In re Murchison, 349 U.S. 133 (1955). 20

People v. Gleason, 240 Ill. App. 3d 249, 181 Ill. Dec. 271, 608 N.E.2d 344 (1st Dist. 1992) 1, 7, 25, 27

People v. Gleason, 612 N.E.2d 518 (Ill. 1993) 7

People v. Jones, 86 Ill. App. 3d 278, 407 N.E.2d 1121 (4th Dist. 1980) 16

Smith v. Wainwright, 664 F.2d 1194 (11th Cir. 1981) 26

United States v. Blackwell, 694 F.2d 1325 (D.C.Cir.1982) 19

United States v. Goodwin, 625 F.2d 693 (5th Cir. 1980) . . 12, 13, 19

United States v. Mazzilli, 848 F.2d 384 (2nd Cir. 1988) . 24

United States v. Smith, 478 F.2d 976 (D.C. Cir. 1973) 19

United States v. Tucker, 404 U.S. 443 (1972) 27

United States v. Victoria, 837 F.2d 50 (2nd Cir. 1988) . 22, 24

United States v. Wheeler, 219 F.2d 773 (7th Cir. 1955), cert. denied, 349 U.S. 944 (1955) 20

Washington v. Texas, 388 U.S. 14 (1979) 19

CONSTITUTIONAL PROVISIONS

U.S. Const., Fifth Amendment . . 2

U.S. Const., Sixth Amendment . . 2

U.S. Const., Fourteenth Amendment . 3

STATUTES

28 U.S.C. § 1254 2

28 U.S.C. § 2254 . . . . 2, 7

720 ILCS 5/5-2 16

720 ILCS 5/5-8-1 24

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

UNITED STATES of America ex rel.
Patrick GLEASON, PETITIONER

v.

George WELBORN,
Warden of the Menard
Correctional Center,

and ATTORNEY GENERAL OF THE
STATE OF ILLINOIS,
RESPONDENT

Petition for Writ of Certiorari to the
United States Court of Appeals for the
Seventh Circuit

PRAYER

Petitioner Patrick Gleason respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 42 F.3d 1107 (7th Cir. 1994), and is attached hereto at Appendix A. The opinion of the Illinois Appellate Court is reported at 240 Ill. App. 3d 249, 181 Ill. Dec. 271, 275, 608 N.E.2d 344, 350 (1st Dist. 1992), and is attached hereto at Appendix C.

JURISDICTION

On December 9, 1994, the United States Court of Appeals for the Seventh Circuit affirmed the United States District Court's dismissal of Gleason's habeas corpus petition filed under 28 U.S.C. § 2254. See Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ...."

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ...."

STATEMENT OF THE CASE

On the morning of March 12, 1989, Petitioner Patrick Gleason walked into an all-night tavern located just west of Chicago, Illinois with a gun tucked into his belt. Within seconds of his entry into the tavern, Gleason was engaged in a physical altercation with a bouncer named Jeffrey Karris. Moments later, Gleason drew his weapon and fired two or three times in rapid succession, one bullet striking Karris, and the other striking an off-duty Stone Park police officer named Frank Costa. Karris and Costa suffered serious, but not fatal, injuries from the single gunshot wounds.

A. The Proceedings In Illinois Courts.

Gleason was tried by the court without a jury. The main witnesses against Gleason were the two victims of the shooting, Frank Costa and Jeffrey Karris. These witnesses testified that at approximately 7:15 a.m. on March 12, 1989, Mika Gleason ("Mika"), the petitioner's brother, accompanied by Michael Griffin ("Griffin") and Robert Moreno ("Moreno"), attempted to enter the Stay Out All Night discotheque ("Stay Out"), an all-night tavern located in Stone Park, Illinois, just west of Chicago. A doorman refused them entrance, informing Mika that the Stay Out was closed. Mika persisted, claiming that he needed to find someone inside. A scuffle ensued in which Mika was pushed out the door of the tavern and tackled to the ground.

Police officer Frank Costa, having left work across the street at 7 a.m.,

was present in the Stay Out as these events transpired. Mika testified that while on the ground, one bouncer slammed his face into the cement while off-duty Officer Costa and another man kicked him in the head. Costa and Karris denied that Mika was beaten although Karris, the bouncer, admitted that when Mika got up off the ground, he had a "bruised face" and a "black eye." Mika testified that before he was allowed to leave Karris threatened, "you ever come back here I'll kill you."

After this altercation, Costa and Karris went back inside the Stay Out while Mika, Griffin, and Moreno drove to the Gleason home where Mika lived with petitioner (his older brother) and their mother and father. In the car, Mika "told Robbie [Moreno] take me home. I'm going to get a gun. I'm going to come back and kill these guys."

At the Gleason home, Mika went upstairs while Moreno and Griffin waited in the car. Mika entered the room he shared with petitioner and removed a rifle from under Petitioner's bed. As Mika was attempting to load the rifle, petitioner woke up, saw his brother's bloodied face and took the weapon from him. Mika explained that he was going to return to the Stay Out to kill the individuals who had beaten him. Mika also told his brother that the blond haired bouncer (Karris) had threatened to kill him if he came back. Gleason took the rifle away from his brother and said: "You are not going no where. Let me go find out what happened."

Petitioner got dressed, retrieved

his .44 magnum pistol from a strong box, tucked it into his waistband, and went down to the car where Moreno and Griffin were waiting. In Moreno's car, Gleason said, "let's go over to the Stay Out Lounge." Gleason testified that his intention was "[j]ust to find out what happened why he [Mika] got beat up. I asked Robbie [Moreno], but he really had no explanation." Gleason testified that he brought the weapon with him because Mika had explained that "his life was threatened that someone was going to kill him if he returned."

When they arrived at the Stay Out, Gleason got out of the car alone, and entered the tavern through the front door, which was unlocked although the tavern was closed. Moreno and Griffin remained in the car. The State's witnesses testified that once inside the tavern, Jeffrey Karris approached Gleason and told him that the bar was closed; Gleason knocked Karris to the ground, drew his gun and shot officer Costa, who was seated at the bar. Petitioner then shot Karris as he attempted to stand.

However, Gleason testified that Karris grabbed him when he entered the tavern and that Gleason knocked Karris down. Then, Gleason turned to his right and saw a man in dark clothes lifting an "object," and shot Costa. Immediately thereafter, Gleason shot Karris because Karris was coming at him in a threatening manner. Gleason stated that he could only remember firing two shots and that the entire incident took five or six seconds. Gleason testified that he drew and fired his pistol because he believed his life was in danger; that he never

intended to kill anybody; and that he had never before fired a weapon at another person. That afternoon, Gleason, accompanied by his attorney, surrendered himself to the Cook County Sheriff's Department.

The trial judge, Ronald Banks, sitting without a jury, found Gleason guilty on all counts -- attempted murder, aggravated battery, and armed violence. Judge Banks imposed a 40-year "extended-term" sentence. The Appellate Court of Illinois affirmed the conviction but reduced the sentence to 30 years, the maximum legal sentence. People v. Gleason, 240 Ill. App. 3d 249, 181 Ill. Dec. 271, 608 N.E.2d 344 (1st Dist. 1992). Appendix C. The Illinois Supreme Court denied Gleason's Petition for Leave to Appeal. People v. Gleason, 612 N.E.2d 518 (Ill. 1993).

B. The Proceedings In Federal Courts.

On July 20, 1993, Gleason filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois alleging that he was "in custody in violation of the Constitution ... of the United States." 28 U.S.C. § 2254(a). In particular, Gleason alleged that (1) his right to compulsory process was violated where the trial court refused to compel the testimony of an important witness where there was no apparent basis for that witness' fear of incrimination; (2) he was denied his right to a fair and impartial trial because the trial judge was biased against him; and (3) his thirty year sentence is unconstitutionally disproportionate and

is the result of a flawed sentencing process. The district court denied the petition, and the Seventh Circuit Court of Appeals affirmed. Gleason v. Welborn, 42 F.3d 1107 (7th Cir. 1994).

These federal questions were timely raised in the Illinois Courts under federal and state constitutional principles. The first two issues were rejected by the Illinois Appellate Court. The third issue was raised but not considered by the Illinois Supreme Court. All three issues were then raised in the United States District Court in a habeas corpus petition. Petitioner presently appeals the denial of that petition.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED HIS RIGHT TO COMPULSORY PROCESS WHERE THE TRIAL JUDGE REFUSED TO COMPEL THE TESTIMONY OF A CRITICAL WITNESS ALTHOUGH THE RECORD REVEALS NO CONCEIVABLE BASIS FOR THE WITNESS' CLAIMED FEAR OF INCRIMINATION; THIS CASE DEMONSTRATES THE NEED FOR THIS COURT TO DEFINE MINIMAL CONSTITUTIONAL SAFEGUARDS TO ASSURE PROTECTION OF THE COMPULSORY PROCESS RIGHTS OF THE ACCUSED AS WELL AS THE FIFTH AMENDMENT CONCERNS OF A RELUCTANT WITNESS.

A. The Reluctant Witness.

In the instant case, petitioner attempted to call Robert Moreno as his first trial witness. On the evening of the shooting, Moreno had accompanied Mika Gleason (petitioner's brother) to the Stay Out and was with Mika when he was beaten up outside the tavern. Moreno also returned to the Stay Out with petitioner and Michael Griffin at the time of the shooting.

Before Moreno took the stand, Moreno's attorney informed the trial judge that Moreno had been interviewed by the prosecutor "and based on that conversation with the State, the possibility came up that he could be prosecuted." Defense counsel moved the court to compel Moreno's testimony. The trial judge then conducted an examination of Moreno. Prior to examining the witness, Judge Banks remarked to Moreno's attorney: "Don't worry about calling him." The court's examination of Moreno

went as follows:

> Q (by the Court): What is your name?
>
> A: Robert Moreno.
>
> Q: And you related to the State and defense that you do not wish to testify on the grounds that your 5th Amendment grounds may incriminate you to testify, is that right, did you say that?
>
> A: Yes.
>
> Q: Did you tell your lawyer, I don't know if you are the one, did you tell the lawyer and tell the State that you didn't wish to testify in this case before the court, yes or no?
>
> A: Yes, sir.
>
> Q: That is all I wanted. And you feel if you did testify there is the potential of self-incrimination, is there, is that right?
>
> A: Yes.
>
> Q: So your decision that you are making after talking to your attorney which there is nothing wrong with that and --
>
> A: Yes.

Judge Banks then denied Gleason's motion to compel Moreno's testimony, providing the following explanation:

> I have heard all of the State's witnesses and testimony already. And Mr. Moreno's name has been mentioned many times in this case. And in evaluating the case, taking testimony in the way it was mentioned, how it was mentioned, and in regards to what was mentioned, I believe along with the witness here that if he did take the stand, whatever he said knowing the potential questions of both state and defense, that he would, if he testified, incriminate himself and open himself to possible charges against him.

Defense counsel made an offer of proof as to the questions he intended to ask Moreno. Defense counsel represented that Moreno's testimony was essential for the defense in that it would impeach the credibility of the state's witnesses. In particular, defense counsel stated that Moreno's testimony would demonstrate that Michael Griffin had presented fabricated testimony regarding the altercation between Mika Gleason and the Stay Out doormen, and regarding the events which immediately followed the shooting.

B. This Honorable Court Should Set Forth Standards Which Trial Courts Can Follow In The Very Common Situation Of The Reluctant Defense Witness To Assure Protection Of The Constitutional Rights Of <u>Both</u> The Witness <u>And</u> The Defendant.

The Sixth Amendment to the United

States Constitution guarantees a criminal defendant's right to compulsory process. Of course, the accused's right to compulsory process does not include a right to compel a witness to waive his Fifth Amendment privilege not to incriminate himself.

This Court has ruled that the assertion of the Fifth Amendment privilege "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1950). Thus, the witness is not exonerated from answering a question merely because he declares that in doing so he would incriminate himself. The witness' "say-so does not of itself establish the hazard of incrimination." Hoffman, 341 U.S. at 486. The witness may not establish the privilege by his "bald assertion of the privilege." United States v. Goodwin, 625 F.2d 693, 700 (5th Cir. 1980).

However, this Court has never considered how a trial court should determine whether the reluctant witness has a legitimate Fifth Amendment concern. As a result, there is no universal standard to be followed in such cases. Often times, a witness called by the defense is reluctant to testify out of fear of possible retaliation. Such witnesses may assert an unfounded Fifth Amendment concern in order to avoid testifying for the defense. At present, trial courts are free to ignore a criminal defendant's Sixth Amendment right to compel the presence of a reluctant witness in favor of the reluctant witness' purported fear of

incrimination which is often entirely imaginary or even fabricated.

In the case at bar, petitioner called Robert Moreno to testify, not only in support of a man accused of shooting a local, off-duty police officer, but also to testify about that officer's acts of brutality against the brother of the accused. It is not surprising that Moreno was reluctant. Under these circumstances, Moreno's purported reliance on the Fifth Amendment should not have been accepted without some scrutiny and evaluation.

Only the Fifth Circuit has provided any real guidance to trial courts on how to evaluate the legitimacy and scope of a reluctant witness' privilege without requiring the witness to "surrender the very protection which the privilege is designed to guarantee." Hoffman, 341 U.S. at 486. In United States v. Goodwin, 625 F.2d 693, 702 (5th Cir. 1980), the court discussed how the trial judge can protect the defendant's right to compulsory process without jeopardizing the witness' right not to incriminate himself:

> "Better results can be obtained if a trial judge conducts a hearing with the witness in his chambers out of the jury's presence. In such a hearing the witness need not reveal the details of his possible liability. But he must describe in general terms the basis of the liability actually feared. He must give a description that is at least adequate to allow the trial judge to determine whether the fear of

> incrimination is reasonable and, if reasonable, how far the valid privilege extends. This is to allow the trial judge to make a decision regarding the witness' obligation to answer each question as asked. A record can be made that is separate from the record kept of the proceedings in the courtroom. This record could be sealed and opened only for appellate review, if necessary. Such an in camera hearing in this case could have informed both the trial judge and this Court."

The Fifth Circuit approach of an in camera hearing with a record that is sealed except for appellate review is a well-reasoned procedure which protects the witness from compelled self-incrimination while also protecting the accused's right to compel the testimony of reluctant witnesses who do not have legitimate Fifth Amendment concerns. Of course, the Fifth Circuit's approach is not the only one. However, because this Court has never considered the issue, there is no minimal requirements and trial courts are free to do as they please. This absence of universal standards for evaluating the legitimacy of a reluctant witness' purported fear of incrimination deprived petitioner of the testimony of a critical witness.

C. The Trial Judge's Examination Of Robert Moreno Was Constitutionally Deficient.

Under any reasonable standard, the trial judge did not properly inquire as to the legitimacy of the privilege

claimed by Robert Moreno. The judge asked only leading questions solely designed to obtain an admission on the record that the witness feared incrimination. The judge made no inquiry into the basis, legitimacy or scope of the claimed privilege. The record further reveals that the trial judge had already made up his mind not to compel the witness' testimony before conducting any inquiry.[1]

The court below finds the trial judge's examination of Moreno adequate under the circumstances. Citing Hoffman, 341 U.S. at 486-87, the court states: "A detailed examination of the witness is neither required nor appropriate .... From his knowledge of the State's case Judge Banks knew that Moreno's fear of self-incrimination was not 'fanciful.' Further inquiry was therefore unnecessary." Gleason v. Welborn, 42 F.3d 1107, 1110 (7th Cir. 1994).

The trial judge's pseudo-examination of Moreno might have been constitutionally adequate if Moreno's fear of incrimination were truly obvious. Here, however, Moreno's purported fear is a complete mystery. The court below finds the blanket excusal of Moreno proper because "if Moreno knew that petitioner intended to shoot people inside the Stay Out when Moreno drove petitioner there and waited, Moreno would be criminally accountable for petitioner's crimes." Id., 42 F.3d at

---

[1] Prior to commencing the inquiry, Judge Banks told Moreno's attorney: "Don't worry about calling him."

1109 (citation omitted). The Seventh Circuit ignores the fact that according to the state's own witness, Michael Griffin, Moreno did not know of petitioner's criminal intent.

The undisputed trial testimony of Griffin, Mika and petitioner established that Moreno's first encounter with Patrick Gleason on that fateful morning was when Gleason entered Moreno's car and said, "let's go over to the Stay Out Lounge." Prosecution witness Michael Griffin testified that Gleason only told Moreno "to drive him to the Stay Out because he wanted to find out what happened." Gleason did not tell Moreno that he was armed; nor did he tell Moreno that he intended to commit a crime at the Stay Out tavern.

Under Illinois law, "a person is legally accountable for the conduct of another when: ... Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2.[2]

---

[2] To be accountable as a getaway driver, a person must be a knowing participant <u>during the commission of the crime</u>, not after. <u>People v. Jones</u>, 86 Ill. App. 3d 278, 282, 407 N.E.2d 1121, 1124 (4th Dist. 1980) ("When the plan, express or implicit, calls for a person to sit in a car while the crime is being committed and then to spirit the others away from the scene, the driver's participation is deemed to occur during

Moreno was not accountable for the shooting unless he knew that Gleason intended to commit a crime at the time Moreno drove petitioner to the Stay Out.[3] Yet, according to all of the witnesses, including the state's witness, neither Moreno nor Griffin was aware that petitioner intended to commit any crime until after the shooting.

Even if Moreno had had a legitimate fear of incrimination with respect to answering questions about the shooting, he had no conceivable reason not to answer questions about the earlier incident in which Mika was beaten. The trial court's granting Moreno a blanket excusal was clearly improper. The court below writes:

> Petitioner ignores the fact that '[h]ad [Moreno] testified for the defense he would have opened himself up to broad-ranging cross-examination by the prosecution. For having decided to testify, a witness cannot assert the Fifth Amendment privilege with respect to specific questions if they are within the

---

the commission of the crime, not after.")

[3] To be an accomplice in Illinois, one must aid and abet "before or during the commission of an offense...." It is undisputed that petitioner acted alone at the time of the shooting. Thus, for Moreno to be accountable, he would have to have aided petitioner before the offense by driving him to the tavern with knowledge that petitioner intended to commit a crime.

scope of his testimony; he cannot deprive the opposing party of the right to cross-examination.'

Gleason v. Welborn, 42 F.3d at 1110 (quoting United States v. Herrera-Medina, 853 F.2d 564, 567-568 (7th Cir.1988).)

The Seventh Circuit's finding that Moreno might have opened himself up to "broad-ranging cross-examination" is clearly erroneous. The two critical events in this case were separated by approximately thirty minutes. The trial court could have easily restricted the questioning of Moreno to one incident without exposing him to questioning on the other incident. For this reason as well, the trial court's failure to compel Moreno's testimony violated the petitioner's right to compulsory process.

D. The State Prosecutor's Warning To Subpoenaed Defense Witness Moreno Was Plainly A Threat That Resulted In Depriving Gleason Of Moreno's Testimony.

The only evidence in the trial record which suggests a basis for Moreno's fear of prosecution was supplied by Moreno's attorney who informed the court that Moreno was interviewed by the prosecutor and that, in that interview, "the possibility came up that he could be prosecuted." This remark raises the question why Moreno was warned but not Griffin. The latter was also in the car with petitioner and testified for the state without immunity. The only conceivable explanation for why the state called Griffin as a witness but threatened Moreno with prosecution, is

that the state liked Griffin's version of events better than Moreno's version, and that the two versions were conflicting.

The right of a defendant to establish a defense by presenting his own witnesses is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19 (1979). Threats against witnesses are intolerable. Substantial interference by the prosecution "with a defense witness' free and unhampered choice to testify violates due process rights of the defendant." United States v. Goodwin, 625 F.2d at 703. See also United States v. Blackwell, 694 F.2d 1325, 1334 (D.C.Cir.1982) ("The constitutional right of a criminal defendant to call witnesses in his defense mandates that they be free to testify without fear of governmental retaliation."); United States v. Smith, 478 F.2d 976, 979 (D.C. Cir. 1973) (prosecutor's warning to defense witness that if he took the stand and testified that he would be prosecuted for carrying a concealed weapon "was a threat that resulted in depriving the defendants of [witness'] testimony").

Here, the inference that the state coerced Robert Moreno into silence is inescapable. The state had no legitimate basis to charge Moreno as an accomplice in the shooting. Moreno, like Griffin, was simply an eyewitness to the events which led to the shooting. The prosecutor's warning that Moreno could be prosecuted was not a truthful warning, nor was it timely, necessary, or appropriate. Rather, it was a threat that resulted in depriving petitioner of the testimony of a critical witness.

II.

PETITIONER WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL TRIAL BECAUSE THE TRIER OF FACT WAS BIASED AGAINST HIM.

This Court has long recognized that freedom of the tribunal from bias or prejudice is an essential element of due process. See e.g., In re Murchison, 349 U.S. 133, 136-37 (1955). The trial judge has a duty to remain impartial throughout the entire trial and to conduct the trial with a view of eliciting the truth and attaining justice. United States v. Wheeler, 219 F.2d 773 (7th Cir. 1955), cert. denied, 349 U.S. 944 (1955).

It is conceded that judicial bias is a difficult thing to establish. It is indeed unlikely that a trial judge will state on the record that he or she is biased against the accused. Evidence of judicial bias must instead be gleaned from the manner in which the judge conducts the trial.

It is hard to imagine how a trial judge could have demonstrated his bias any more certainly than did Judge Banks absent an explicit statement of bias. At the trial and sentencing, Judge Banks improperly cross-examined three defense witnesses, refused to compel the testimony of one defense witness, and then imposed an illegal extended-term sentence without any request by the state.

As discussed in Part One of this petition, the trial court improperly questioned Robert Moreno regarding his

decision to invoke his Fifth Amendment privilege. The trial judge was obligated to make an appropriate inquiry into the basis of the privilege claimed. Yet, the judge cross-examined Moreno with leading questions designed to gain an admission that the witness feared incrimination, thus assisting the prosecution by preventing testimony favorable to the defense. The trial court's intent is further demonstrated by the fact that the judge told Moreno's attorney "not to worry about calling him [Moreno]" before the judge even began the examination.

The other two improper interrogations by the trial judge took place at the sentencing hearing. Petitioner's father, Clarence Gleason, testified for his son in mitigation. As Mr. Gleason attempted to describe his observations on the morning of March 12, 1989, the trial judge interrupted to conduct the following interrogation:

> DEFENSE COUNSEL: Was there in fact an argument in your house on that particular morning?
>
> CLARENCE GLEASON: Yes, my kid [Mika] came home after being beaten up by a couple of those guys over there.
>
> THE COURT: Were you there, sir?
>
> A: No.
>
> THE COURT: So you don't know that?
>
> A: Okay, okay, forget it. He came home beaten up, that I know.

THE COURT: That you know.

This interrogation was improper in that it served no purpose other than to discredit the defendant's father. See United States v. Victoria, 837 F.2d 50 (2nd Cir. 1988) (trial court's interrogation of defendant was in the nature of a cross-examination challenging his credibility and deprived defendant of a fair trial). Mr. Gleason's observation about how Mika looked when he came home that evening was proper evidence in mitigation because it tended to show that Gleason was acting under a strong provocation. It was clearly offered solely for that purpose. The trial judge could not possibly have been confused about the scope of Clarence Gleason's testimony. Mr. Gleason never suggested that he witnessed Mika's beating at the Stay Out tavern. The court's hostile interruption served no legitimate purpose and demonstrated its bias against petitioner's cause.

The trial judge also improperly interrupted Gleason's allocution to conduct the following interrogation about the gun used in the shooting:

> THE DEFENDANT: I would like to start off to say that I am truly sorry for the pain I have caused Mr. Karris and Mr. Costa -- and I don't see him here. I'm also sorry for the pain that they're respective families have endured. On the other hand, I feel -- truly believe that my life was in jeopardy and if the incident had not happened the way it did, I would not be alive to tell you this today.

THE COURT: Where did you get the .44 Magnum?

THE DEFENDANT: Where?

THE COURT: It is a simple question, you had it, where did you get it?

A: At a gun store.

THE COURT: At a gun store?

A: Yes.

THE COURT: Very powerful weapon, isn't it?

A: Yes.

THE COURT: Probably one of the most powerful weapons we have in a handgun, wouldn't you say?

A: Yes.

THE COURT: What else would you like to say?

Here, the judge exhibited hostility towards petitioner by not even allowing him the chance to speak his mind, without interruption, before his sentence was imposed. The interrogation was also directed to irrelevant matters. Clearly, the place where Gleason purchased his gun had no bearing on any issue relating to his guilt or to the proper sentence.

The trial court is entitled to question witnesses to test the memory of witnesses, to avoid confusion on the part of jurors, and to clarify points that are

deliberately obfuscated or are simply confusing. Gayle v. Scully, 779 F.2d 802, 813 (2nd Cir. 1985), cert. denied, 479 U.S. 838 (1986). The court may not, however, assume the role of the prosecutor. While it is unquestionably proper for the government to seek to impeach a criminal defendant's testimony, that is not a proper function of the court, as it must maintain the appearance of impartiality and detachment. United States v. Mazzilli, 848 F.2d 384 (2nd Cir. 1988). See also United States v. Victoria, 837 F.2d 50, 55 (2nd Cir. 1988) (trial judge's interrogation of defense witnesses deprived the defendants of a fair jury trial).

Further, the trial court's sua sponte imposition of an illegal extended-term sentence shows bias. In Illinois, the maximum sentence for attempted murder, a Class X felony, is 30 years. 730 ILCS 5/5-8-1(a)(3). An extended sentence may be imposed on a first time offender only where the offense is "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." 730 ILCS 5/5-8-2 and 730 ILCS 5/5-3.2(b)(2).

Not one of the necessary factors justifying an extended term was present in this case. The record is completely devoid of any evidence of exceptional cruelty, callousness, or lack of remorse. In addition, Gleason has no prior history of criminal activity and no history of violence. It is inconceivable how the trial court could have found this case to be an exceptionally brutal and heinous case of attempted murder.

The Illinois Appellate Court agreed that Gleason's crime did not warrant an extended sentence and that the trial judge abused his discretion by finding that the defendant acted in an exceptionally brutal and heinous manner. People v. Gleason, 608 N.E.2d at 349. The trial court's decision to ignore the compelling evidence in mitigation, as well as the clear mandates of the sentencing code, is further evidence of its hostility towards the petitioner.

Gleason waived his right to a jury trial thereby placing his liberty in the hands of his trial judge. The fact that this judge was hostile to the defendant made the judge incapable of according Gleason a fair trial. No single episode of judicial misconduct caused the unfair trial. Rather, it was the trial court's hostility and bias, as evidenced by his misconduct, that caused the violation of petitioner's right to due process.

III.

GLEASON'S THIRTY YEAR SENTENCE IS THE RESULT OF A FLAWED SENTENCING PROCESS.

On direct appeal, Gleason raised several challenges to his forty-year sentence. The Illinois Appellate Court considered only one sentencing issue: whether the judge was authorized to impose an extended sentence. The court concluded that the extended sentence was not authorized and simply lopped off the illegal portion of the sentence without considering the other challenges to the sentence or the mitigating circumstances which call for leniency in this case.

Such a procedure is unconstitutional and subject to habeas review. While the severity of a sentence imposed within statutory bounds will not ordinarily be reviewed in a habeas proceeding, the alleged impropriety of the sentencing process itself is subject to review. Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1981).

The court below states: "The Appellate Court of Illinois considered mitigating circumstances in reducing petitioner's sentence from 40 years to 30." Gleason v. Welborn, 42 F.3d at 1112 (citation omitted). However, the Illinois Appellate Court discussed mitigating factors only as a basis to reject the extended-term sentence. In overturning the invocation of the extended term, the Appellate Court stated:

> Defendant is a first time offender. The trial judge conceded that defendant comes from a loving family and still lives with his parents. Defendant has been employed by the same company for 10 years. Moreover, at sentencing, 40 people were present to testify to defendant's good character. Defendant showed remorse for his actions and the pain it has and will cause the victims, their families and his family. Additionally, at trial, defendant testified that he feared for his life and that the circumstances under which he went to the Stay Out were emotionally charged.

People v. Gleason, 608 N.E.2d at 349.

The Illinois Court did not find that any of these mitigating circumstances were factored into the sentence imposed. Nor did the court explicitly consider these factors in resentencing Gleason. Instead, the Court simply determined that the extended sentence was illegal and then lopped off the illegal portion of the sentence. Nowhere in the opinion does the Court explain why Gleason deserves the maximum penalty for his crime.

It is evident that the Illinois Appellate Court imposed the maximum thirty-year sentence solely to accommodate the personal desire of the trial judge that Gleason be severely punished. A criminal defendant has a due process right to be sentenced only upon accurate, relevant, and reliable information in a proceeding that accords with standards of fundamental fairness. United States v. Tucker, 404 U.S. 443 (1972). The trial judge's bias and hostility towards this defendant is not a relevant or proper consideration for sentencing. Moreover, the fact that the trial judge sought to impose a sentence ten years longer than the maximum legal sentence raises doubts about the reliability of Judge Bank's ability to fairly evaluate the aggravating and mitigating circumstances. In light of the overwhelming mitigating circumstances in this case, Gleason's maximum sentence of thirty years is wholly unjustified.

The Eighth Amendment to the United States Constitution prohibits the

infliction of cruel and unusual punishments. Gleason's crime, when viewed in its worst possible light, portrays a twenty-four year old man, who out of a misplaced devotion to his younger brother and a desire for revenge, fires a handgun three times and severely injures two persons. While such an offense deserves to be punished, it does not the warrant the warehousing of Patrick Gleason for his entire adult life.

CONCLUSION

WHEREFORE, Petitioner Patrick Gleason respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

LEONARD C. GOODMAN
53 W. Jackson
Suite 1460
Chicago, Illinois 60604
(312) 986-1984

Attorney for Petitioner

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 94-2257
Patrick Gleason,

Petitioner-Appellant,

v.

George WELBORN and Roland W. Burris,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 93 C 4332--**Ann Claire Williams**, Judge.

Argued Nov. 4, 1994--
Decided Dec. 19, 1994.

Before CUMMINGS, PRATT[1] and MANION, Circuit Judges.

CUMMINGS, Circuit Judge.

Patrick Gleason was convicted of

---

[1] The Honorable George C. Pratt of the United States Court of Appeals for the Second Circuit is sitting by designation.

attempted murder, armed violence and aggravated battery in the Circuit Court of Cook County, Illinois, and given a 40-year sentence. The Appellate Court of Illinois affirmed the conviction but reduced the sentence to 30 years. People v. Gleason, 240 Ill.App.3d 249, 181 Ill.Dec. 271, 608 N.E.2d 344 (1st Dist.1992). Gleason subsequently filed a petition for writ of habeas corpus in the court below. The district court denied the petition, resulting in this appeal.

At about 7:15 a.m. on March 12, 1989, Mika Gleason ("Mika"), the petitioner's brother, accompanied by Michael Griffin ("Griffin") and Robert Moreno ("Moreno"), attempted to enter the Stay Out All Night discotheque ("Stay Out"). A doorman refused them entrance, informing Mika that the Stay Out was closed. Mika persisted, claiming that he needed to find someone inside. Mika came out on the short end of the scuffle that ensued between himself and one or more doormen.

Police officer Frank Costa, having left work across the street at 7 a.m., was present in the Stay Out as these events transpired. It is disputed whether Costa helped Mika from the ground or helped put him there, but Costa was at least present for part of the melee and then returned to the bar.

Mika returned to the car with Griffin and Moreno. Mika told Moreno to take him home so that he could get his gun and "come back and kill these guys." Moreno drove Mika to his home and waited in the car with Griffin while Mika went inside. Mika entered the room he shared with petitioner and removed an HK 91 assault

rifle from under petitioner's bed. Petitioner woke up, saw his brother's bloodied face and took the weapon from him. Mika explained that he was going to return to the Stay Out to kill the individuals who had beaten him. Petitioner told his brother to stay put, tucked his .44 magnum pistol into his waistband and went down to the car where Moreno and Griffin were waiting. The three then returned to the Stay Out.

When they arrived, the door to the Stay Out was closed. Petitioner left the car and entered by himself. Once inside, petitioner was physically stopped by a doorman, Jeff Karris. Petitioner knocked Karris to the ground, drew his gun and shot officer Costa, who was seated at the bar. Petitioner then shot Karris as he attempted to stand.

Discussion

I. Right to Compulsory Process

Petitioner first contends that the trial court denied him the right to compulsory process when it allowed his proposed witness, Robert Moreno, to invoke his right against self-incrimination and not testify. Petitioner's Sixth Amendment right to compulsory process does not override a witness' privilege against self-incrimination. Unless it is perfectly clear from the proof that the testimony cannot possibly have a tendency to incriminate the witness, the trial court may properly allow the witness to invoke his privilege and refuse to testify. Hoffman v. United States, 341 U.S. 479, 488, 71 S.Ct. 814, 819, 95

L.Ed. 1118 (1951).

Moreno drove petitioner to the Stay Out, waited while petitioner entered and shot the two victims, drove petitioner away, and did not notify the police. From these facts alone, Moreno is prosecutable for obstruction of justice. People v. Jones, 86 Ill.App.3d 278, 282, 41 Ill.Dec. 623, 407 N.E.2d 1121 (4th Dist.1980). More importantly, if Moreno knew that petitioner intended to shoot people inside the Stay Out when Moreno drove petitioner there and waited, Moreno would be criminally accountable for petitioner's crimes. Id. That Moreno had this knowledge or belief is hardly far-fetched. Moreno saw Mika get beaten. After hearing Mika say that he was going to go home and get his gun and kill the people who beat him, Moreno drove Mika home and waited outside in the car presumably while Mika got his gun. The fact that petitioner rather than his little brother emerged from the house did not necessarily alter Moreno's understanding of the purpose of the return trip to the Stay Out. Petitioner claims that because Moreno was with him both immediately before and immediately after the shooting, "Moreno's testimony was critical as to Gleason's state of mind." Br. 23. But Moreno's testimony about his knowledge or understanding of petitioner's state of mind was also potentially incriminating. Moreno's fear of self-incrimination was thus far from "fanciful." In re Corrugated Container Antitrust Litigation, 661 F.2d 1145, 1150 (7th Cir.1981), affirmed under the name of Pillsbury Co. v. Conboy, 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983).

Petitioner argues that there were particular questions which Moreno could have answered which did not pose a danger of self-incrimination so that the trial court's blanket excusal was improper. Petitioner ignores the fact that "[h]ad [Moreno] testified for the defense he would have opened himself up to broad-ranging cross-examination by the prosecution. For having decided to testify, a witness cannot assert the Fifth Amendment privilege with respect to specific questions if they are within the scope of his testimony; he cannot deprive the opposing party of the right to cross-examination." United States v. Herrera-Medina, 853 F.2d 564, 567-568 (7th Cir.1988).

Petitioner also questions the adequacy of the trial court's examination of Moreno before the court excused him from testifying. The trial judge asked Moreno if he had told the state and defense that he did not want to testify for fear of self-incrimination. Moreno said that he had. The judge then asked if after talking to his attorney, Moreno felt there was the potential for self-incrimination. Moreno answered in the affirmative. Judge Banks then denied petitioner's motion to compel Moreno's testimony with the following explanation:

> I have heard all of the State's witnesses and testimony already. And Mr. Moreno's name has been mentioned many times in this case. And in evaluating the case, taking testimony in the way it was mentioned, how it was mentioned, I believe along with the witness here that if he did take the stand,

> whatever he said knowing the potential questions of both state and defense, that he would, if he testified, incriminate himself and open himself to possible charges against him.

Def.Br. 12. In questioning the propriety of the judge's actions, the petitioner ignores the teaching of Hoffman, that "[t]he trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' " Hoffman, 341 U.S. at 487, 71 S.Ct. at 818 (citation omitted). A detailed examination of the witness is neither required nor appropriate: "If the witness, upon interposing his claim were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." Id. at 486, 71 S.Ct. at 818. From his knowledge of the State's case Judge Banks knew that Moreno's fear of self-incrimination was not "fanciful." Further inquiry was therefore unnecessary.

II. Bias of Trial Judge

Petitioner asserts that in his bench trial his due process right to a fair trial was denied because Judge Banks, the trier of fact, was biased against him. This argument was rejected by the Appellate Court of Illinois. People v. Gleason, 240 Ill.App.3d 249, 256, 181 Ill.Dec. 271, 275-276, 608 N.E.2d 344,

348-349 (1st Dist. 1992)[2] and by Judge Williams below. We agree with those rulings.

Petitioner cites numerous acts which allegedly show Judge Banks' bias.

A. Trial judge's questioning of witnesses

1. Robert Moreno

Petitioner claims that the alleged inadequacy of the trial judge's examination of Moreno with respect to his claim of privilege evidences the trial judge's bias. Since we have already found that Judge Banks' examination of Moreno was adequate and appropriate under the circumstances, we need not consider this claim further.

2. Clarence Gleason

The trial judge's two other allegedly "improper interrogations" (Def.Br. 26) occurred at the sentencing hearing. The first involved petitioner's father, Clarence Gleason, who testified for his son in mitigation. During the hearing the following exchange occurred:

DEFENSE COUNSEL: Was there in fact an argument in your house on that particular morning?

CLARENCE GLEASON: Yes, my kid [Mika] came home after being beaten up by a

---

[2] The Illinois Supreme Court denied the petition for leave to appeal. People v. Gleason, 149 Ill.2d 654, 183 Ill.Dec. 866, 612 N.E.2d 518 (1993).

couple of those guys over there.

THE COURT: Were you there, sir?

A: No.

THE COURT: So you don't know that?

A: Okay, okay, forget it. He came home beaten up, that I know.

THE COURT: That you know.

Pet.Br. 26-27. Petitioner claims that the court's questioning was improper and "served no purpose other than to discredit the defendant's father." Id. First, since this occurred at the sentencing hearing following a bench trial, there was no one in front of whom the witness could be discredited except the judge himself who asked the questions. Second, because the witness was attempting to testify to facts of which he had no personal knowledge, the trial judge's questioning, though perhaps unnecessary, was a proper attempt to eliminate possible confusion, particularly with respect to Clarence Gleason's claim that it was "a couple of those guys over there" who beat his son.

3. Patrick Gleason

The third and final allegedly improper interrogation occurred when Judge Banks interrupted the petitioner's allocution during sentencing and asked him where he got the .44 magnum he used in the assaults. The judge also asked petitioner if he was aware that the .44 magnum was one of the most powerful handguns available. Petitioner's

knowledge of the power of his chosen weapon suggests that the severe injuries suffered by his victims were clearly foreseeable by the petitioner, a consideration obviously relevant to the sentencing judge. The court's questioning of petitioner on this matter was therefore neither inappropriate nor evidence of bias.

B. Evidentiary rulings

Petitioner further contends that the trial court's evidentiary rulings show bias against the petitioner.

1. Exclusion of Michael Griffin's probationary status

The trial judge refused to admit evidence that the State's witness, Michael Griffin, was on probation for a misdemeanor charge of driving under the influence ("DUI") at the time of trial. Petitioner now argues that Griffin's probationary status may have evidenced an illicit motive for his testifying on behalf of the state. Petitioner, however, made no such argument at trial, arguing instead that Griffin's DUI conviction implied that Griffin's testimony was suspect for want of sobriety. Griffin, however, had already testified to his propensity for drunkenness. Furthermore, when the issue was raised the prosecution stipulated to Griffin's probationary status for the DUI conviction. The trial judge's exclusion of further evidence on the issue was neither an abuse of discretion nor evidence of bias.

2. Admission of evidence of the

severity of the victims' injuries

Petitioner next argues that evidence of the severity of the victims' injuries was "irrelevant and prejudicial" and its admission "further demonstrates [the trial court's] bias." Br. 35. However, as Judge Williams pointed out below, evidence of the severity of the wounds "was relevant to Gleason's crimes because: A person who intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery" under Illinois law. Pet.App. 16-17.

C. Imposition of the extended term sentence

Petitioner's final alleged evidence of bias was the trial court's imposition of a 40-year extended term sentence. The Appellate Court of Illinois, finding that Gleason had not acted "in an exceptionally brutal or heinous manner," reduced the sentence from 40 years to the maximum term of 30 years for attempted murder. Gleason, 240 Ill.App.3d at 257, 181 Ill.Dec. 271, 608 N.E.2d 344. That a majority of the Appellate Court disagreed with the trial judge's determination of heinousness does not imply that the trial judge was biased. Indeed, one of the three justices of the Illinois appellate court agreed with the trial judge that Gleason's conduct was "exceptionally brutal and heinous." Id. at 259, 181 Ill.Dec. 271, 608 N.E.2d 344 (Justice Campbell dissenting).

III. Imposition of 30-year sentence

Petitioner challenges the sentence

of 30 years in prison imposed by the Appellate Court of Illinois for two counts of attempted murder, four counts of aggravated battery and two counts of armed violence. Petitioner contends that the sentence is disproportionate and the result of a constitutionally flawed process. We reject both contentions.

As Judge Williams observed in the court below, a federal court will not normally review a state sentencing determination which, as here, falls within the statutory limit. Williams v. Duckworth, 738 F.2d 828, 831 (7th Cir.1984). There has been no showing that the sentencing court lacked jurisdiction to impose this term or committed a constitutional error making the sentence fundamentally unfair. Bean v. United States, 679 F.2d 683, 685 (7th Cir.1982).

The reduced sentence was within the statutory range and has not been shown to be "fundamentally unfair" through constitutional error. The Appellate Court of Illinois considered mitigating circumstances in reducing petitioner's sentence from 40 years to 30. Gleason, 181 Ill.Dec. at 276, 608 N.E.2d at 349. The sentence will not be disturbed.

The district court's decision is affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: December 19, 1994

BEFORE:
Honorable Walter J. Cummings, Circuit Judge
Honorable George C. Pratt, Circuit Judge*
Honorable Daniel A. Manio, Circuit Judge

No. 94-2257

UNITED STATES OF AMERICA ex rel. PATRICK GLEASON,

Plaintiff-Appellee

v.

GEORGE WELBORN and ROLAND W. BURRIS,

Defendants-Appellants

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 93 C 4332, District Court Judge Ann Claire Williams

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

---

* The Honorable George C. Pratt, of the United States Court of Appeals for the Second Circuit, is sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. PATRICK GLEASON,	)
Petitioner,	)
v.	)
Case No. 93 C 4332	)
GEORGE WELBORN and ROLAND W. BURRIS,	)
Respondents.	)

MEMORANDUM OPINION AND ORDER

In January 1991, Patrick Gleason ("Gleason") was convicted of two counts of attempted murder, four counts of aggravated battery, and two counts of armed violence. On February 19, 1991, Gleason was sentenced to an extended term of forty years incarceration, and he appealed. The convictions were affirmed, but the sentence was reduced to thirty years. People v. Gleason, 608 N.E. 2d 344, 350 (Ill. App. 1992). Gleason now petitions this court for a writ of habeas corpus. For the reasons explained below, the petition is denied.

Background

The pertinent facts are as follows.[1] At approximately 7:10 a.m. on the morning of March 12, 1989, Mike Gleason ("Mika"), Michael Griffin ("Griffin"), and Robert Moreno ("Moreno") went to the Stay Out All Night Discotheque ("the Stay out"), in Stone Park, Illinois, to look for Moreno's girlfriend, Terry. When the three got to the door of the Stay Out, they were told that it was closed, Mika persisted and tried to push his way into the disco. Then, Mika and several doormen, including Jeffrey Karris ("Karris), became engaged in an altercation outside the disco which resulted in Mika being pushed to the ground and receiving a swollen eye and a bloody mouth.[2] The Stone Park Police Department arrived, but no one pressed charges. Subsequently, Mika, Griffin, and Moreno left the Stay Out and drove to the Gleason house.

During the ride to his house, Mika said he was "going to get a gun" and "come back and kill these guys."

---

[1] For a full recitation of the trial testimony, see Gleason, 608 N.E.2d at 345-47.

[2] Mika testified that only he and Moreno entered the club, while Griffin remained in the car. According to Mika, Karris told him the disc was closed, and began pushing him and Moreno out the door. Also, several other doormen "attacked" Mika, who fell outside on the ground. Mika states that these doormen beat his head against the concrete and kicked him. See Gleason, 608 N.E.2d at 347.

Gleason, 608 N.E.2d at 347. After they arrived, Mika got a rifle from underneath his bed, where his brother, petitioner Patrick Gleason, was sleeping. As Mika was loading the rifle, Gleason awoke and asked Mika what he was doing. Mika explained that he had been beaten up at the Stay Out. Gleason took the rifle away from Mika and indicated that he would go back tot hr Stay Out to find out what happened. *Id.* at 347. Gleason left the house with a loaded .44 Magnum pistol, while Mika stayed behind

Moreno drove Gleason and Griffin back to the Stay Out. When they arrived, Gleason went into the tavern alone. Karris approached Gleason and told him that the bar was closed, Gleason pushed Karris with his left hand, and fired three shots from the revolver in his right hand. Frank Costa, an off-duty Stone Park policeman, and Karris were both shot and seriously injured.[3]

According to Griffin, who heard the gunshots, Gleason returned to the car "shaking and sweating." *Id.* at 346. He pointed the gun at Griffin and told him "[y]ou didn't hear nothing --" *Id.* Gleason later stated that he believed he

---

[3] Gleason testified that Karris grabbed him when he entered the disco, however, petitioner knocked him tot he ground. Then when Gleason turned to his right, he thought he saw a man in dark clothes lifting an object, and shot Costa. Immediately thereafter, Gleason shot Karris because Karris was coming at him in a threatening manner. Gleason, 608 N.E.2d at 347.

had just shot a police officer. *Id.* That afternoon, Gleason accompanied by his attorney, surrendered himself to the Cook County Sheriff's Department. *Id.* at 347.

In January 1991, Gleason was convicted of attempted murder, armed violence and aggravated batter after a bench trial before Judge Ronald Banks in the Illinois Circuit Court for the Fourth District. On February 19, 1991, Judge Banks imposed an extended term sentence o forty years incarceration. Gleason appealed to the appellate court, which affirmed his convictions, ut reduced his sentence to thirty years because "the circuit court abused its discretion by finding that defendant acted in an exceptionally brutal and heinous manner." *Id.* at 349. Gleason was subsequently denied a Petition for Leave to Appeal with the Illinois Supreme Court. *People v. Gleason*, 612 N.E.2d 518 (Ill. 1993).

Gleason now petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[4] Specifically, Gleason alleges that his conviction was tainted on the grounds that (1) he was denied is right to compulsory process, (2) he was denied a fair trial because Judge Banks,

---

[4] Section 2254 provides in part that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

acting as the trier of fact,, was biased against him, and (3) his sentence was the result of a constitutionally flawed sentencing process. (Petitioner's Memo at 19). The court rejects each of these contentions.

Discussion

As an initial matter, the court rejects the State's argument that Gleason's claim are procedurally defaulted. Specifically, the State contends that, after *Coleman v. Thompson*, 111 S.Ct. 2546 (1991), no federal court has the authority to grant habeas review in this case. In *Coleman*, the Supreme Court stated that it "will not review a question of federal law decided by a state court if the decision rests on s state law ground that is independent of the federal question and adequate to support the judgement. *Id. at 2553-54*. The Court also made clear that the "independent and adequate state ground" doctrine is used to determine "whether federal district courts should address the claims of state prisoners in habeas corpus actions." [5] *Id.* at 2554. However, *Coleman* is inapposite here.

In *Coleman*, the petitioner Robert Keith Coleman, was convicted of rape and murder in a Buchanan County, Virginia

---

[5] As the Supreme Court noted early in its opinion, Coleman generally "concerns the respect that federal courts owe to States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." Id. at 2552.

court. After the Virginia Supreme Court affirmed his conviction and death sentence, Coleman sought collateral relief in the circuit court, raising numerous federal constitutional issues not raised on direct appeal. This habeas petition was denied, and Coleman filed a notice of appeal in the circuit court. When he later filed a petition for appeal in the Virginia Supreme Court, the Commonwealth of Virginia moved to dismiss on the sole ground that Coleman's notice of appeal had ben filed late under a Virginia Supreme Court Rule.[6] *Id.* at 2553. After reviewing the parties' briefs, the Virginia Supreme Court granted the motion to dismiss. *Id.* at 2553. After reviewing the parties' briefs, the Virginia Supreme Court granted the motion to dismiss. *Id.*

Sometime later, Coleman sought federal habeas corpus relief and asserted four federal claims raised in his direct appeal, and seven claims raised for the first time in state habeas. The federal district court found that the seven claims were procedurally defaulted because of the Virginia Supreme Court dismissal. The Fourth Circuit affirmed, holding that Coleman had procedurally defaulted all of the claims raised for the first time in state habeas. *Id.* In short, the "independent and adequate state ground" was Coleman's failure to

---

[6] Specifically, Virginia Supreme Court Rule 5:9(a), which provides that "no appeal shall be allowed unless a notice of appeal is filed with the trial court within 30 days of final judgement." Id. at 2553.

comply with a Virginia Supreme Court procedural requirement.

However, in the instant case, the State fails to identify the procedural provision constituting the claimed independent and adequate state ground. In fact, the Illinois appellate court expressly rejected the contention that Gleason's petition was procedurally defaulted. *See Gleason*, 608 N.E.2d at 348 ("general rule that errors not object to at trial are waived is inapplicable where the complained-of error is a circuit court's improper questioning of witnesses".

Moreover, this court rejects the State;s conclusory assertion that no constitutional right" of Gleason was violated, and that "only questions of Illinois law were resolved on appeal." (Respondents' Memo at 7). While it is true that the appellate court cited only state cases in its opinion, those cases discussed constitutional issues. For instance, in discussing the appropriateness of Gleason's sentence, the Illinois appellate court cited *People v. La Pointe*, 431 N.E.2d 344 (Ill. 1981). Significantly, *La Pointe* relies on the standard established by the Supreme Court in *Roberts v. United States*, 445 U.S. 552 (1980), for limiting the scope of a judge's inquiry at sentencing. Similarly, the state appellate court analyzed *Bradford v. Soto*, 512 N.E.2d 765 (Ill. App. 1987), in weighing Gleason's Sixth Amendment compulsory process guarantee against Moreno's Fifth Amendment protection from self-incrimination. *See Bradford*, 512 N.E.2d at 768-69 and cases cited therein. In

Coleman, the court explained:

> [I]n habeas,if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of these claims, r to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.

111 S.Ct at 2556. Therefore, the State's reliance on the "independent and adequate state grounds" doctrine is misplaced. Accordingly, the court addressees each of Gleason's grounds for habeas relief in turn.

I.

Compulsory Process Claim

Based upon an interview with the State, Moreno's attorney informed the court, on the record, that Moreno would invoke the Fifth Amendment privilege if he were called to testify by either side. (Tr. 394).[7] Gleason's attorney then argued that Moreno should not be allowed to merely make a blanket assertion of the privilege, and cited supporting case law. (Tr. 397-402). Gleason also claimed that he had a Sixth Amendment right to put

---

[7] All references to the trial transcript of proceedings are designated "Tr."

Moreno on the witness stand, and to determine if particular questions were incriminating. (Tr. 402). In his offer of proof, Gleason explained that Moreno's testimony would show that Griffin lied about seeing the first altercation with Mika and about the time when he called 911.[8] (Tr. 407).

In contrast, the State argued that is was not erroneous to prohibit the calling of a witness who has indicated that he will invoke the Fifth Amendment. Moreover, the State claimed that it would be prejudicial to allow Moreno to testify to certain matters on direct, but to invoke the Fifth on cross-examination. (Tr. 403). The State insisted that it was sufficient to prohibit Moreno's testimony if there was "reasonable cause" to suspect that testifying would subject Moreno to self-incrimination. (Tr. 404).

As Moreno's attorney was explaining that Moreno's fear stemmed from his conversation with the State, Judge Banks said, Don't worry about calling him." (Tr. 405). The court then conducted the following examination:

---

[8] When Gleason moved for a new trial, he claimed that Moreno's testimony would have shown that Gleason did not intend to kill anyone when he left his house togo to the Stay Out. However, the court noted that Griffin had already testified that Gleason asked to be driven to the Stay Out "just... to find out who beat up his brother." Gleason, 608 N.E.2d at 346. (See also Tr. 467).

Q: (by Court): And you related to the State and defense that you do not wish to testify on the grounds that your 5th Amendment grounds may incriminate you to testify, is that right, did you say that?

A: (by Moreno): Yes.

Q: Did you tell lawyer... and tell the State that you didn't wish to testify in this case before the court, yes or no?

A: Yes.

Q: So your decision that you are making after talking to your attorney which there is nothing wrong with that and --

A: Yes.

(Tr. 405-06). Then, the court stated:

I also have to take into consideration the testimony that I have heard. I have heard all of the State's witnesses and testimony already. And Mr. Moreno's name has been mentioned many times in this case. And in evaluating the case, taking testimony in the way it was mentioned, how it was mentioned, and in regards to what was mentioned, I believe along with the witness here that if he did take the stand, whatever he said knowing the potential questions of both state and defense , that he would, if he testified, incriminate himself and open himself to possible charges against him.

(Tr. 406).

Gleason contends that the trial court's inquiry into the bias for Moreno's assertion of the privilege was inadequate. (Petitioner's Memo at 22). Moreover, Gleason claims that he was improperly denied his right to compulsory process under the Sixth Amendment when the trial judge refused to allow Moreno to testify. (Petitioner's Memo at 19).

It is clear that a detailed inquiry into the witness' basis for claiming the privilege would force the witness "to surrender the very protection which the privilege is designed to guarantee." *Hoffman v. United States*, 341 U.S. 479, 486 (19510. Thus, the trial court is faced with a delicate balancing task. Without knowing the details of Moreno's involvement in the crime, the trial court could not evaluate the reasonableness of his fear of self-incrimination. However, by inquiring too closely into Moreno's role, the trial judge would have risked violating the privilege. here, the Illinois appellate court determined that "the circuit court did make the appropriate inquiry. *Gleason*, 608 N.E.2d at 348. In reaching this decision, the appellate court noted that Judge Banks allowed the defendant to provide case law and make an effort of proof, heard argument on the matter, noted the frequency of the testimony involving Moreno, and emphasized the potential for self-incrimination. *Id.*

Gleason contends that Moreno's criminal liability hinges on his knowledge of Gleason's criminal intent, which has not been shown here. (Petitioner's Memo at 23). The court

disagrees. Moreno drove Gleason to the Stay Out, after having heard his brother Mika threaten to come back and kill the doormen at the club. (Tr. 435). Moreover, Gleason wet into the Stay Out by himself, but Griffin, who was in the car with Moreno, testified that he heard the gun shots. (Tr. 168). Griffin also stated that Gleason appeared shaken, got in the car with both men, saying "[y]ou didn't hear nothing, see nothing." (Tr. 169). Gleason then told them that he shot two people, and he thought one if them was a cop. (Tr. 170). Moreno drove Gleason away from the scene of the crime, and presumably, did not notify the police. Given the presumption of correctness accorded to state court factual findings, and these facts showing Moreno's involvement, the court rejects Gleason's compulsory process claim.

II.

Trial Court Bias

Gleason contends that the trial court's bias denied him a fair trial in contravention of his process right. In particular, Gleason argues that the court displayed its bias against him by (1) its interrogation of the witnesses; (2) exclusion of favorable defense impeachment evidence and admissions of prejudicial prosecution evidence of the severity of the victims' wounds; and (3) imposition of the extended term sentence.

A. Improper Interrogation of Witnesses

Gleason claims that the trial court's bias was evidenced by his improper interrogation. Gleason states

that the first instance of such questioning occurred in the Moreno examination, quoted *supra*. In addition, Gleason argues that there were two other instances of this bias during sentencing. During the sentencing portion of the proceedings, Gleason's father testified in mitigation. During this testimony, the court engaged in the following colloquy:

> **A (by Clarence Gleason):** Yes my kid [Mika} came home after being beaten up by a couple of these guys over there.
>
> **Q (by court):** Were you there, sir?
>
> **A:** No.
>
> **Q:** So you don't know that?
>
> **A:** Okay, okay, forget it. He came home beaten up, that I know.
>
> **Q:** That you know.
>
> (Tr. 551).

Gleason also points to the following interruption during his allocution:

> **Q (by court):** Where did you get the .44 Magnum?
>
> **A (by Gleason):** Where?
>
> **Q:** It is a simple question, you had it, where did you get it?
>
> **A:** At a gun store.

Q: At a gun store?

A: Yes.

Q: Very powerful weapon isn't it?

A: Yes.

Q: Probably one of the most powerful weapons we have in a handgun, wouldn't you say?

A: Yes.

Q: What else would you like to say?

(Tr. 574-75).

After reviewing the trial transcript, this court find that the trial court's questions fail to indicate bias. First, the court has already determined that the questions posed to Moreno were adequate under the circumstances. Moreover, the trial court has a responsibility here when Gleason's father attempted to testify to events which he did not witness. *See United States ex rel. Bradley v. Lane*, 834 F.2d 645, 648-49 (7th Cir. 1987). Also, the court agrees with the State's conclusion that this brief and isolated interruption of Gleason's allocution does not show that the court was incapable of according Gleason a fair trial.

Furthermore, the court notes that the latter instances of questioning occurred during the sentencing phase of his bench trial, and did not interfere with the presentation of evidence. Thus, the instant case is distinguishable from

those Gleason cites in his memorandum. *See, e.g., United States v. Mazzilli*, 848 F.2d 384, 388 (2d Cir. 1988) (court "played overly intrusive role during [defendant's] testimony" ad "left the jury with the indelible impression that the court did not believe [defendant's] account of the facts"); *United States v. Victoria*, 837 F.2d 50, 55 (2d Cir. 1988) (Judge's interrogation of defendant-witness "served to convey to the jury here the judge's opinion that the witness was not worthy of belief" and constituted "a deprivation of a fair jury trial"); *Rinehart v. Brewer*, 561 F.2d 126, 132 (8th Cir, 1977) (judge;s improper *ex parte* examination of physician led to his "conclusion that society needed to be permanently protected from [defendant]").[9]

B. Evidentiary Rulings

Gleason argues that the trial court erroneously refused to admit evidence of Griffin's probationary status for a misdemeanor charge of driving under the influence ("DUI"). However, Gleason also contends that the court allowed "allowed every state witness [to provide] an extensive description of the victims' wounds, or of the sorrow they experienced when they viewed the wounds." (Petitioner's Memo at 33).

---

[9] The court also notes tat Gleason's reliance on Derden v. Mcneel, 938 F.2d 605 (5th Cir. 1991) is singularly misplaced: that decision of a panel of the Fifth Circuit was reversed en banc, 978 F.2d 1453 (5th Cir. 1992)

With respect to Griffin's record, Gleason correctly observes that by barring evidence of griffin's conviction, the trial court may have prevented Gleason from exploring the possibility that Griffin had an illicit motive for testifying on the state's behalf, i.e., that he might have agreed to testify in exchange for some benefit or promise. If true, the trial court would have committed a potentially serious error because "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

However, as the State correctly points out, this objection is not available to Gleason. he never suggested at trial that Griffin might have offered his testimony to the State in exchange for lenient treatment or any other benefit. *Gleason*, 608 N.E.2D AT 348-49. At trial, Gleason sought this information solely to show that Griffin;s testimony was suspect because of his lack of sobriety. (*See* Petitioner's Memo at 7). However, Griffin had already testified to his propensity for drunkenness. (*See id.*). In addition, when the issue was raised, the State stipulated to Griffin's probationary status for the DUI conviction. (Tr. 178). Exclusion of further similar evidence does not constitute a due process violation. *See United States v. Cerro*, 775 F.2d 908, 916 (7th Cir. 1985) (any error of trial court in restricting "impeachment evidence of a marginal and cumulative nature must be deemed harmless beyond a reasonable

doubt"). Certainly, exclusion of such evidence does not reveal any bias.

As for the evidence on the severity of the victims's wounds this court cannot agree that such evidence was "not relevant to any issue relating to the defendant's guilt or innocence." (Petitioner's Memo at 33). The plain language if Ill. Rev. Stat. ch. 38 12-3 (and, by incorporation, 33 A-1) indicates that this evidence was relevant to Gleason's crimes because: "a person who ...intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery." Although the court is mindful of the fact that there was a stipulation including all of the medical records, the admission of additional testimony on the severity of the victims' injuries was not as problematic here because the case was not tried to a jury.

Moreover, there were several instances were the court struck improper emotional testimony. For instance, the judge sustained petitioner's objection to Costa's testimony regarding his "surgeries and bone grafts," after noting that there was a stipulation to the medical records. (Tr. 27-28). Similarly, the court sustained Gleason's objection to Mrs. Karris' highly emotional testimony that she "realized [her husband] was dying before [her] eyes, " and struck the testimony. (Tr. 215-16). In addition, the court notes that Gleason's attorney did not even object to some of the more inflammatory testimony, i.e, karris' testimony that he "scooped up [his] liver" after he was shot because his "insides were coming

out." (tr. 105).

C. Imposition of the Extended Term Sentence

Gleason also argues that the extended term sentence imposed by the trial court indicates its bias. In support, Gleason quotes Ill. Rev. Stat. ch. 38, 10055-3.2(b), which provides in pertinent part: "The following factors may be considered by the court as reasons to impose an extended term sentence... When a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal r heinous behavior indicative of wanton cruelty." here, Gleason insists, there was no "brutal or heinous behavior" on his part justifying the extended sentence.

The appellate court did, in fat, find that the trial court's application of the statute to the instant case was inappropriate. In reaching that conclusion, the court applied the Illinois Supreme Court's definition of "heinous" articulated in the *La Pointe* case. 431 N.E.2d at 344. In that case,

> the defendant, a young man with a significant history of criminal activity, acted with premeditated, cold-blooded deliberation in deciding to kill a cab driver... Following that murder and while being held in the county jail, he displayed a callous attitude and complete lack of remorse by wearing the tee shirt with the words "Elmhurst Executioner"

appearing thereon.

Id. at 353. The circumstances surrounding Gleason's actions were quite different.

However, Gleason's lack of brutality does not automatically mean that his sentence was the product of the trial court's bias. Rather, the sentence merely shows that the court found Gleason's crimes very serious and his conduct reprehensible. Although this court agrees with the Illinois appellate court decision, it notes that one of the judges dissented after concluding that "the trial court did not err in finding defendant's conduct exceptionally brutal and heinous..." *Gleason*, 608 N.E.2d at 351 (Campbell, J., dissenting) (noting that Gleason acted out of revenge, had no immediate provocation, had threatened Griffin, and scarred victims for life). Consequently, the court rejects Gleason argument that the imposition of the extended term indicate bias. Furthermore, the court notes that its examination of he record as a whole fails to support Gleason's claim that the trial court was biased.

III.

The Sentencing Process

Gleason's last argument is that the sentencing process in his case was constitutionally flawed because his sentence was so disproportionate to the crime. This claim is rejected.

A federal court will not normally review a state sentencing determining

which falls within the statutory limit. *Williams v. Duckworth*, 738 F.2d 828, 831 (7th Cir. 1984). Rather, "a criminal sentence can be attacked in a habeas corpus proceeding only if the sentencing court lacked jurisdiction to impose it or committed a constitutional error that made the sentence or underlying conviction fundamentally unfair." *Bean v. United States*, 679 F.2d 683, 685 (7th Cir. 1982). Such is not the case here.

Gleason has not shown fundamental unfairness in a sentencing process which resulted in a sentence which was within the statutory minimum. Moreover, this court rejects the argument that the sentencing process was constitutionally unfair because all relevant factors were not properly evaluated when the appellate court imposed the statutory maximum of thirty years. *See* Petitioner's Memo at 36). In short, there is simply no basis for Gleason's assertion that the appellate court failed to consider any mitigating circumstances in resentencing him. In his own memorandum, Gleason quotes language from the appellate court opinion which explicitly recognized mitigating factors such as Gleason's standing in the community, devotion to family, ad showing of remorse. (Petitioner;s memo at 36). Therefore, this claim is without merit.

Conclusion

For the foregoing reasons, Gleason's petition for a writ of habeas corpus is denied.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: March 10, 1994

APPENDIX C

The PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

Patrick GLEASON, Defendant-Appellant.

No. 1-91-0628.
Appellate Court of Illinois,
First District, First Division.

Dec. 28, 1992.

Genson, Steinback & Gillespie, Chicago (Jeffrey B. Steinback, Leonard C. Goodman, of counsel), for defendant-appellant.

Jack O'Malley, Cook County State's Atty., Chicago (Janet Powers Doyle, Asst. State's Atty., argued; Renee Goldfarb, Eileen O'Neill, Deborah Alexander, Asst. State's Attys., of counsel), for plaintiff-appellee.

Presiding Justice BUCKLEY delivered the opinion of the court:

After a bench trial, defendant Patrick Gleason was found guilty of attempted murder, armed violence and aggravated battery. The circuit court sentenced defendant to an extended term of 40 years incarceration. Defendant appeals his conviction and sentence. We affirm defendant's conviction and reduce his sentence to 30 years imprisonment.

Officer Frank Costa testified that on March 11 and 12, 1989, he worked as a police officer from 11 p.m. to 7 a.m.

Costa testified that when he went off duty he placed his weapon in his locker along with his rig and put on his regular street jacket. On March 12, at approximately 7:15 a.m., Costa left the police station and went across the street to the Stay Out All Night Discotheque. After Costa had been at the Stay Out for about five minutes, someone informed him that there was a fight at the front door. Costa saw the doorman, Jeff Karris, outside with someone else on the ground. The man on the ground stated that he "didn't want no problems. He just wanted to get up and leave." Costa testified that he helped the man up off the ground and the man left. Then, Costa went back into the bar and sat on a bar stool about six feet from the doorway.

Costa further testified that at approximately 7:50 a.m., defendant entered the bar and was walking in when Karris approached him. Karris informed defendant that the bar was closed. Defendant "karate chopped" Karris, causing him to fall to the ground. Defendant then pulled out a gun. Costa testified that he shouted to warn Karris of the gun. Defendant aimed the gun at Costa and shot him in the left arm and chest. Costa heard a total of three shots. Costa attempted to follow defendant out the door in order to get a license plate number, but failed. Thereafter, Costa went to the police station and informed them of the shooting before collapsing on the floor. As a result of his gunshot wound, Costa underwent three bone graft surgeries on his arm and one surgery on his chest. The State and defendant stipulated that Costa's left lung collapsed and that

bullet fragments were and still are embedded in the apex of that lung. Costa identified defendant in a photo lineup.

Next, Karris testified that on March 11 and 12, 1989, he was employed and working at the Stay Out. Karris stated that at about 7:15 a.m. on March 12 he overheard an argument at the front door of the bar. Karris saw Mika Gleason holding a doorman's arms after he was told the bar was closed. Karris claims that he was attempting to talk Mika into going home, when Mika knocked him to the ground. Karris explained that a fight ensued until Mika retreated.

Karris further testified that at approximately 7:45 a.m., defendant walked into the Stay Out. Karris told defendant that the bar was closed and that he was not allowed to come into it. Then, defendant shoved Karris with his left hand, while his right hand pulled out a gun. Karris testified that he turned to run, but was shot. Karris had to scoop up his insides and place them back into his body. The gunshot hole in Karris' side was about the size of his fist. Karris was taken to Loyola Hospital and remained there for 21 days. Karris endured at least three surgeries and was in and out of a coma for four to five days.

Michael Griffin also testified on behalf of the State. Griffin testified that on March 11, 1989, he went to a bar, Cocos, in Melrose Park and had a couple of beers and some shots of Jack Daniels and tequila. In the early morning hours of March 12, 1989, Griffin left Cocos with Robert Moreno and went to

Interactions, another bar. At Interactions, Griffin met Mika Gleason. Later, Griffin, Moreno and Mika went to the Stay Out. When they arrived at the Stay Out, the doorman informed them that the bar was closed. Mika persisted in telling the doorman that he needed to find someone in the lounge. Mika began pushing people to get into the bar. The doormen held Mika on the ground. Later, Mika returned to the car and told Griffin that he was going to get his brother.

Mika got defendant and went back to the Stay Out. Defendant stated to Griffin that he just wanted to find out who beat up his brother. Griffin testified that defendant walked into the Stay Out and seconds later Griffin heard gunshots. Griffin further testified that defendant came out of the bar, shaking and sweating. Defendant pointed the gun at Griffin and told him "[y]ou didn't hear nothing, see nothing * * *." Defendant later stated to Griffin that he thought he shot a police officer. Additionally, Griffin testified that he called 911 and made a report to the Elmhurst Police Department concerning the incident. Griffin identified defendant in a lineup.

Mary Karris, Jeff Karris' wife, testified that she was working at the Stay Out as a bartender, the morning her husband was shot. Mary testified that at about 7:50 a.m. on March 12, 1989, she saw defendant raise a gun in his right hand. She dove under the bar, heard three shots and then, heard someone say that "he was gone." As she rose off the floor she heard someone say that her husband had been shot. Mary saw that her

husband was pale, holding his side and perspiring tremendously. Mary identified defendant from a photograph.

William Robinette, manager of the Stay Out, Amaira Del Prete and Carolyn Dubiel, waitresses there, and Patricia Diane Story, a bartender there, also testified for the State. Robinette's, Prete's, Dubiel's and Story's testimonies corroborates that of other witnesses. All four of the above witnesses identified defendant in a lineup.

Last, Officer James Jasinski testified for the State that he had been dispatched to a fight at the Stay Out on March 12, 1989. When Jasinski arrived he saw Costa and Karris bending in a downwards position. By the time he exited his squad car, a man got off the ground and began to walk away. Then, Jasinski left the scene. Jasinski testified that at about 7:50 a.m. he received another dispatch message that a man had been shot at the Stay Out and that Costa had also been shot and was presently at the police station.

Mika Gleason was the first witness to testify for the defense. Mika testified that at approximately 7:10 a.m. on March 12, 1989, he walked into the Stay Out. A doorman informed Mika that the bar was closed. Mika testified that he requested permission to look for his friend's girl friend. Mika claims that the doorman would not permit him to go any further and that he pushed Mika. Thereafter, Mika grabbed the doorman by his arm and pushed him. Mika then testified that he was pushed and kicked out of the bar and beaten up. Mika told his friend to take

him home because he was "going to get a gun" and "come back and kill these guys."

Mika further testified that he arrived at home at about 7:30 a.m., ran upstairs and grabbed a rifle from underneath his bed. Defendant, his brother, was sleeping in the bed at that time. Defendant woke up and Mika told him that five men had beaten him up. Defendant took the gun from Mika. Defendant left the house. Mika testified that police woke him up and informed him that they believed defendant had been involved in a shooting.

Defendant testified on his own behalf. Defendant stated that he was 26 years old and living with his parents. Defendant also stated that he had completed two years of high school. Defendant testified that he had been employed by Boyer Beason Vanlines as a furniture mover for the past 10 years.

Defendant explained that in the morning hours of March 12, 1989, he was awoken by his brother loading his HK 91 assault rifle. Defendant noticed Mika's eye was swollen closed and that his mouth was bleeding. Defendant took the weapon from Mika when Mika indicated that he was going to the Stay Out to kill the people that had beaten him up. Defendant put the rifle away and went into the living room to get his pistol. Defendant tucked the .44 Magnum pistol into the left side of his pants, after making sure it was loaded. Defendant stated that he was fully prepared to use the weapon if necessary. Moreno drove defendant to the Stay Out and parked in the driveway about seven to eight feet from the left of the

entrance.

Further, defendant testified that upon arriving at the Stay Out, the door was closed. Defendant testified that he entered the bar and Karris physically stopped him by placing his hands on both of defendant's shoulders. After Karris grabbed him, defendant hit Karris, causing him to fall. Defendant stated that then he saw a man in dark clothes lifting an object. Defendant claims that he felt his life was in danger so he drew his pistol and fired it. Finally, defendant testified that he, accompanied by his attorney, surrendered himself to the Cook County Sheriff's Police.

First, defendant argues that the circuit court improperly allowed Robert Moreno to refuse to testify under the fifth amendment right against self-incrimination. In order to sustain an invocation of the fifth amendment, the circuit court needs only to determine whether there is a reasonable basis for believing that a danger to a witness may exist in answering questions. (Bradford v. Soto (1987), 159 Ill.App.3d 668, 111 Ill.Dec. 376, 512 N.E.2d 765.) Furthermore, when balancing the sixth amendment right to compulsory process and the fifth amendment right against self-incrimination, the circuit court must make an appropriate inquiry. Bradford, 159 Ill.App.3d 668, 111 Ill.Dec. 376, 512 N.E.2d 765.

In the case at bar, the circuit court did make the appropriate inquiry. The court also allowed defendant to supply it with case law and make an offer of proof. After hearing testimony and argument on

the matter, the circuit court ruled that Moreno's name had been mentioned on numerous occasions during testimony in a certain manner and in certain contexts that "if he did take the stand, whatever he said knowing the potential questions of both state and defense, that he would, if he testified, incriminate himself and open himself to possible charges against him." There is no evidence that the circuit court abused its discretion by allowing Moreno to invoke his fifth amendment right.

Defendant's second argument is that the circuit court improperly questioned defendant, defendant's father and Mika, thereby assuming the role of prosecutor and thus, denying him a fair trial. Initially, the State argues that this issue is waived because defendant failed to object at trial to this questioning. We disagree. The general rule that errors not objected to at trial are waived is inapplicable where the complained-of error is a circuit court's improper questioning of witnesses. (People v. Johnson (1980), 83 Ill.App.3d 586, 39 Ill.Dec. 147, 404 N.E.2d 531; see also People v. McGrath (1967), 80 Ill.App.2d 229, 224 N.E.2d 660.) In a bench trial, a defendant may be reluctant to interrupt the court's interrogation for fear of antagonizing the judge. Johnson, 83 Ill.App.3d 586, 39 Ill.Dec. 147, 404 N.E.2d 531.

Since this issue has not been waived, we have reviewed it and find that the circuit court did not err by questioning witnesses. A circuit court may question witnesses for the purpose of eliciting the truth or clarifying obscure issues.

(People v. Murray (1990), 194 Ill.App.3d 653, 141 Ill.Dec. 290, 551 N.E.2d 283.) In fact,

"[i]t is the judge's duty to see that justice is done, and where justice is liable to fail because a certain fact has not been developed or a certain line of inquiry has not been pursued it is his duty to interpose and either by suggestions to counsel or an examination conducted by himself avoid the miscarriage of justice[.]" (Murray, 194 Ill.App.3d at 658, 141 Ill.Dec. at 294, 551 N.E.2d at 287, quoting People v. Fanceschini (1960), 20 Ill.2d 126, 132, 169 N.E.2d 244, 247.)

The court's questioning of Moreno for the purpose of ascertaining why the witness seeks to invoke his fifth amendment right clearly is not improper, but rather is required. (See Bradford, 159 Ill.App.3d 668, 111 Ill.Dec. 376, 512 N.E.2d 765.) The other complained-of questioning by the court took place during the sentencing phase of the trial. A trial judge is permitted to ask questions during the sentencing phase because he has the prime responsibility of striking a proper balance between the seriousness of the offense committed and the objective of restoring the offender to useful citizenship. People v. Halstead (1987), 164 Ill.App.3d 1, 115 Ill.Dec. 256, 517 N.E.2d 667.

Next, defendant argues that the circuit court was biased against him because it restricted evidence favorable to the defense, namely that a witness had a previous conviction and an alleged bias. The State stipulated at trial to

the fact that Griffin was serving misdemeanor probation for driving under the influence. The court stated that such evidence was irrelevant because the witness admitted that he had drank alcoholic beverages the night of the shootings. Defendant's argument that he was entitled to explore the witness's predisposition to testify favorably for the State is meritless since the record is devoid of any indication that defendant attempted any such inquiry. For example, defendant never asked Griffin whether he was charged with any offense related to the circumstances of this case. Defendant also alleges that the trial judge was biased because he allowed descriptions of the victims' wounds. Defendant, however, fails to cite to the record as to where this allegedly improper testimony is contained in violation of Supreme Court Rule 367(b). (134 Ill.2d R. 367(b).) The record does not indicate that the trier of fact was biased against defendant so as to deny him a fair trial.

Defendant's next contention is that the circumstances surrounding the attempted murders do not warrant imposing an extended term. A defendant may be sentenced to an extended term for committing attempted murder if certain factors in aggravation are present. (Ill.Rev.Stat.1989, ch. 38, pars. 1005-8-2, 1005-5-3.2(b).) We note that the circuit court found that defendant's crime was accompanied by exceptionally brutal or heinous behavior, a statutory aggravating factor which allows the circuit court to sentence a defendant to an extended term. See Ill.Rev.Stat.1989, ch. 38, par. 1005-5-3.2(b)(2).

The Illinois Supreme Court explained that heinous is "defined by Webster's Third New International Dictionary (unabridged) as 'hateful or shockingly evil: grossly bad: enormously and flagrantly criminal' and 'brutal' includes 'grossly ruthless,' 'devoid of mercy or compassion: cruel and cold-blooded'." (People v. La Pointe (1981), 88 Ill.2d 482, 501, 59 Ill.Dec. 59, 431 N.E.2d 344, 353.) In imposing the sentence, the circuit court referred to defendant's use of a .44 Magnum, the extent of the victims' injuries and the fact that defendant did not call the police as justification for the extended term.

Defendant is a first-time offender. The trial judge conceded that defendant comes from a loving family and still lives with his parents. Defendant has been employed by the same company for 10 years. Moreover, at sentencing, 40 people were present to testify to defendant's good character. Defendant showed remorse for his actions and the pain it has and will cause the victims, their families and his family. Additionally, at trial, defendant testified that he feared for his life and that the circumstances under which he went to the Stay Out were emotionally charged.

An extended-term sentence is reserved for crimes involving exceptionally brutal or heinous behavior. In La Pointe, the supreme court upheld that extended-term sentence because the defendant had a "significant history of criminal activity, acted with premeditated cold-blooded deliberation in deciding to

kill a cab driver * * *. [W]hile being held at the county jail, he displayed a callous attitude and complete lack of remorse by wearing the tee shirt with the words 'Elmhurst Executioner' appearing thereon." Defendant's crime caused grievous injuries, but we hold that the circuit court abused its discretion by finding that defendant acted in an exceptionally brutal and heinous manner.

Reviewing courts have the power under Supreme Court Rule 615(b)(4) to reduce the punishment imposed by the trial court. (134 Ill.2d R. 615(b)(4).) We, therefore, reduce defendant's extended 40-year term to the maximum term for attempted murder, 30 years incarceration.

Lastly, defendant argues that his trial counsel's failure to call witnesses and cross-examine a witness amounted to ineffective assistance of counsel. In order for defendant to prove a claim of ineffective assistance of counsel, he must show that his counsel's presentation fell below an objective standard of reasonableness such as to deprive defendant of a fair trial and that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. (People v. Albanese (1984), 104 Ill.2d 504, 85 Ill.Dec. 441, 473 N.E.2d 1246; Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.) When reviewing trial counsel's behavior we indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 699.

Trial counsel's performance must be evaluated on the basis of the entire record. (People v. Flores (1989), 128 Ill.2d 66, 131 Ill.Dec. 106, 538 N.E.2d 481.) Defendant's trial counsel prepared pre-trial motions for discovery, made a clear opening statement which foreshadowed a defense that defendant did not have the requisite intent to commit attempted murder, made numerous objections during the prosecution's direct examination of witnesses and made a strong closing argument. After reviewing the record, we find that defendant's trial counsel's participation and performance constituted vigorous and effective representation. (See People v. Colley (1988), 173 Ill.App.3d 798, 123 Ill.Dec. 678, 528 N.E.2d 223.) Moreover, defendant must prove that but for counsel's alleged errors, the outcome of the trial would have been different. Defendant cannot prove this. The evidence against defendant is overwhelming. Defendant, himself, testified that he checked to make sure the pistol was loaded before he took it to the Stay Out and furthermore, that he was prepared to use it. Defendant has failed to show how trial counsel's alleged errors prejudiced him. We hold that defendant received effective trial counsel.

For the foregoing reasons, the conviction of the circuit court of Cook County is affirmed and the sentence of the circuit court of Cook County is reduced from an extended-term sentence to a maximum term of 30 years imprisonment.

AFFIRMED AND SENTENCE REDUCED.

MANNING, J., concurs.

CAMPBELL, J., dissents.

Justice CAMPBELL, dissenting in part:

I concur in the majority opinion affirming defendant's conviction, however, I respectfully dissent from that part of the opinion which reduces defendant's extended term sentence from 40 years to 30 years imprisonment.

The standard of review to be applied in determining whether a sentence is excessive is whether the trial court abused its discretion in imposing the sentence. (People v. Timmons (1992), 233 Ill.App.3d 591, 174 Ill.Dec. 616, 599 N.E.2d 162; People v. La Pointe (1981), 88 Ill.2d 482, 59 Ill.Dec. 59, 431 N.E.2d 344.) The trial court is in the best position to make a reasoned judgment as to a sentence which balances the need to protect society and rehabilitate the offender, and its judgment is due great weight and deference. Timmons, 233 Ill.App.3d at 599, 174 Ill.Dec. 616, 599 N.E.2d 162.

The record shows that defendant was convicted of attempt murder, which is a Class X felony punishable by a term of not less than 6 years and not more than 30 years. (Ill.Rev.Stat.1989, ch. 38, pars. 8-4; 1005-8-1(a)(3).) The statutory extended-term provision allows a trial court to impose an extended-term sentence upon a defendant convicted of any felony where "the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." (Ill.Rev.Stat.1989, ch. 38, par. 1005-5-3.2(b)(2).) In evaluating the

brutality and heinousness of a defendant's conduct, the entire spectrum of facts surrounding the given the incident must be analyzed. (People v. McGee (1984), 121 Ill.App.3d 1086, 1089, 77 Ill.Dec. 539, 460 N.E.2d 843.) A court need not find that a defendant inflicted "torture or unnecessary pain" upon his victim in order to find "brutal" or "heinous" behavior (La Pointe, 88 Ill.2d at 482, 59 Ill.Dec. 59, 431 N.E.2d 344); a single act which causes death or injury may be sufficient to demonstrate exceptionally brutal or heinous behavior considering the entire conduct of defendant. McGee, 121 Ill.App.3d at 1090-1091, 77 Ill.Dec. 539, 460 N.E.2d 843.

In the present case, the record shows that defendant's shooting of the two victims was premeditated, in apparent retribution over an argument between Mika Gleason and Karris. The trial court considered defendant's testimony that on the morning of March 12, 1989, defendant told his brother, Mika, not to go back to the Stay Out, that he would go to see what was happening. Defendant then retrieved a loaded .44 Magnum revolver from his closet. The trial court noted, "He has taken one of the most dangerous weapons, * * * a .44 Magnum, * * * If people are standing in the right position you can shoot four of them at the same time, that is how powerful this gun is." Defendant testified that he was prepared to use his weapon. There was no evidence in the record of any immediate provocation of defendant by either victim, both of whom were unarmed.

The record further shows that

defendant gave Karris a "karate chop" in the neck, which knocked him to the ground, and then shot and "brutally injured" both Karris and Officer Costa at close range, leaving Karris with "his guts hanging out" of his stomach. The trial court noted that each victim required multiple surgeries and that each would be "scarred for life." Following the shooting, defendant did not go to the police, and initially threatened Michael Griffin at gunpoint, telling him to say nothing to the authorities.

Under these circumstances, it is my opinion that the trial court did not err in finding defendant's conduct exceptionally brutal and heinous, and sentencing him to an extended term of imprisonment.

For the above reasons, I would affirm defendant's extended term sentence of 40 years imprisonment.